



## **DEPARTMENT OF THE INTERIOR**

### **National Indian Gaming Commission**

#### **25 CFR Part 573**

#### **RIN 3141-AA50**

#### **Enforcement Actions**

**AGENCY:** National Indian Gaming Commission

**ACTION:** Notice of Proposed Rulemaking

**SUMMARY:** This action proposes to amend NIGC regulations to include a graduated pre-enforcement process through which a tribe may come into compliance before an enforcement action is taken by the Chair. Voluntary compliance is the goal of the Commission. This amendment sets forth how Commission staff and tribes may address potential or existing compliance issues. The amendment retains the Chair's authority to issue an enforcement action at the Chair's discretion.

The amendment also modifies this Part to allow a temporary closure order when there is clear and convincing evidence that a gaming operation defrauds a tribe. The current regulation provides for the issuance of a temporary closure order when there is clear and convincing evidence that a gaming operation defrauds a tribe or a customer. The Commission believes this issue has been adequately addressed by ordinance requirements of the IGRA and NIGC regulations, because tribes must include in their ordinances a dispute resolution procedure to address issues where a customer believes she or he has been defrauded. If the tribe fails to follow their ordinance, enforcement action may be taken.

Finally, current regulations do not provide specificity for when an enforcement action becomes final, such as when a notice of violation is issued and there is no appeal filed or settlement agreement reached. The proposed amendment clarifies that an enforcement action becomes final agency action and a final order of the Commission if no appeal is filed or a settlement agreement reached.

**DATES:** Submit comments on or before [[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

1. *Email comments to:* [reg.review@nigc.gov](mailto:reg.review@nigc.gov)
2. *Mail comments to:* National Indian Gaming Commission, 1441 L Street NW, Suite 9100, Washington, D.C. 20005.
3. *Hand deliver comments to:* 1441 L. St. NW, Suite 9100, Washington, D.C. 20005.
4. *Fax Comments to:*  
National Indian Gaming Commission at 202-632-0045.

**FOR FURTHER INFORMATION CONTACT:** National Indian Gaming Commission, 1441 L Street NW, Suite 9100 Washington, D.C. 20005. Telephone: 202-632-7009; email: [reg.review@nigc.gov](mailto:reg.review@nigc.gov)

**SUPPLEMENTARY INFORMATION:**

**I. Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

## **II. Background**

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 et seq., was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (“Commission”) and sets out a comprehensive framework for the regulation of gaming on Indian lands. The purposes of IGRA include providing a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. 2702.

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). On April 4, 2011, after holding eight

consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. Part 573 was included in this regulatory review.

### **III. Development of the Proposed Rule**

The Commission conducted a total of 9 tribal consultations as part of its review of Part 573. Tribal consultations were held in every region of the country and were attended by over 160 tribes and 443 tribal leaders or their representatives. In addition to tribal consultations, on June 28, 2011, the Commission requested public comment on a Preliminary Draft of amendments to Part 573. After considering the comments received from the public and through tribal consultations, the Commission proposes one amendment to Part 573: inclusion of a graduated pre-enforcement process whereby a gaming operation has the opportunity to come into compliance with IGRA, Commission regulations, or tribal ordinances and resolutions approved by the Chair before an enforcement action is taken. This process would not restrict the Chair from initiating enforcement action if circumstances require.

#### **A. Voluntary compliance is a goal of the Commission.**

The proposed draft sets out voluntary compliance as a goal of the Commission and identifies how voluntary compliance can be achieved. Comments in response to the NOI and NRR consistently stated that the NIGC and tribes should be in closer communication prior to the issuance of an enforcement action. While the Commission believes it is necessary for the Chair to retain the discretion to issue an enforcement action whenever

the circumstances require it, the Commission also firmly believes that communicating with tribes before taking an enforcement action can only lead to improved relationships and continued compliance. With these two goals in mind, the Commission published a Preliminary draft of the proposed rule creating a graduated process which can be used by NIGC staff to inform a tribe of potential compliance issues. While there are two measures that can be taken as part of this process, either may be taken independent of the other.

The first and lowest level of notification to the tribe of a possible compliance issue is a “letter of concern.” A letter of concern would be issued when NIGC staff believes there could be a possible violation of IGRA, NIGC regulations, or the tribe’s approved gaming ordinance. The second level of notification to the tribe is a “warning letter.” A warning letter provides notice to the tribe that NIGC staff believes an actual violation of IGRA, NIGC regulations, or the tribe’s approved gaming ordinance has occurred, or is occurring. The letters would provide the factual basis for the potential violation, inform the tribe of any corrective action that may be taken to cure the violation, and provide a timeframe for responding to the letter or coming into compliance. In the Preliminary draft, the second action was called a “non-compliance notice.” Commentors suggested either doing away with the non-compliance notice entirely, or finding a different title for it. The Commission believes having two potential options for action that may be taken by NIGC staff prior to the issuance of an enforcement action is positive for both the NIGC and tribes. However, the Commission did change the name of the second action to a “warning letter.”

The goal of this proposed amendment is to start with the lowest possible action and move forward only if compliance is not achieved. However, under certain circumstances, the NIGC staff may be required to issue a warning letter without first issuing a letter of concern. Alternatively, a letter of concern could be issued and the tribe may fully address the concern without any further action required by the NIGC. This would achieve the goal of voluntary compliance.

Many comments to the Preliminary draft stated that the regulation should require both actions to include a deadline for the tribe to respond if it disagrees with the NIGC's conclusions and a deadline for the tribe to come into compliance. The Commission agrees with this recommendation and incorporated those requirements into this proposed amendment. Some comments to the Preliminary draft questioned whether these letters were final agency action. It is important to note that these actions would be issued by NIGC staff, not the Chair, and are therefore not final agency action.

Other comments acknowledged that certain circumstances will warrant immediate issuance of an NOV and requested that the regulation specify circumstances or criteria that should be present before the Chair can bypass this process and take immediate enforcement action. One commentor stated that while they are confident in this Commission to positively utilize this process, they are concerned future Commissions may disregard the general process. The intent of this proposed amendment is to achieve voluntary compliance before an enforcement action is issued. Presumably, a Chair will not initiate an enforcement action without NIGC staff first having taken appropriate pre-enforcement action unless, in the Chair's judgment, the circumstances require immediate action or it is impracticable to issue one or both of these pre-enforcement actions.

However, if the Chair takes enforcement action before a letter of concern and/or warning letter is issued, the enforcement action will likely explain the reason for moving directly to an enforcement action without pre-enforcement action.

**B. B. Temporary closure order will be issued when there is clear and convincing evidence that a gaming operation defrauds a tribe.**

The proposed rule amends this Part to allow a temporary closure order only when there is clear and convincing evidence that a gaming operation defrauds a tribe, not a customer.

A commentor pointed out that the current regulation provides for the issuance of a temporary closure order when there is clear and convincing evidence that a gaming operation defrauds a customer. The Commission believes this issue has been adequately addressed by ordinance requirements of the IGRA and NIGC regulations. Tribes must include in their ordinances a dispute resolution procedure to address issues where a customer believes she or he has been defrauded. If the tribe fails to follow their ordinance, enforcement action may be taken.

**C. Final Agency Action.**

The current regulations do not provide specificity for when an enforcement action such as a notice of violation is issued and there is no appeal filed or settlement agreement reached. The proposed amendment clarifies that an enforcement action becomes final agency action and a final order of the Commission if no appeal is filed or a settlement agreement reached.

**Regulatory Matters**

***Regulatory Flexibility Act***

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

***Small Business Regulatory Enforcement Fairness Act***

The proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). This rule does not have an annual effect on the economy of \$100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

***Unfunded Mandate Reform Act***

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

***Takings***

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

***Civil Justice Reform***



In accordance with Executive Order 12988, the Commission has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

***National Environmental Policy Act***

The Commission has determined that the proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

***Paperwork Reduction Act***

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and is therefore not subject to review by the Office of Management and Budget.

List of Subject in 25 CFR 573

Enforcement, Enforcement Actions, Gambling, Gaming, Indians, Indian Gaming.

For the reasons stated in the preamble, the National Indian Gaming Commission proposes to amends 25 CFR part 573 as follows:

**PART 573—COMPLIANCE AND ENFORCEMENT**

1. The authority citation for part 573 is revised to read as follows:

Authority: 25 U.S.C. 2706(b)(10); 25 U.S.C. 2713; E.O. 13175.

2. Revise the part 573 heading to read as set forth above.

3. Revise § 573.1 to read as follows:

**§ 573.1 What is the purpose of this part?**

Voluntary compliance is the goal of the Commission. Voluntary compliance is achieved when a tribe and the NIGC staff are able to resolve any potential enforcement issues prior to the Chair issuing an enforcement action. This part sets forth efforts for achieving voluntary compliance and enforcement action when voluntary compliance is not forthcoming. While this part is intended to garner voluntary compliance through a graduated enforcement process, there may be circumstances under which a graduated enforcement process is omitted and an enforcement action must be taken. This part also sets forth general rules governing the Commission's enforcement of the Act, this chapter, and tribal ordinances and resolutions approved by the Chair under part 522 of this chapter. Civil fines in connection with notice of violation issued under this part are addressed in part 575 of this chapter.

4. Add § 573.2 to read as follows:

**§ 573.2 When may a letter of concern and/or warning letter be issued?**

(a) Prior to the Chair taking an enforcement action, a letter of concern and/or a warning letter may be provided to the respondent by NIGC staff, detailing concerns regarding the respondent's compliance with the Act, this chapter, or any tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

(b) Action under this section does not constitute agency action and may be taken by NIGC staff issuing the respondent, either one or both of the following:

(1) A "letter of concern" which recites available facts and information about the incident or condition and indicates that it may be a violation; and/or

(2) A "warning letter" which confirms an assessment of the matter and states the necessary corrective action the respondent needs to take, agrees to take, or has taken.

(c) The letters referenced in paragraph (b) of this section may be issued consecutively, but NIGC staff may issue a warning letter without first issuing a letter of concern.

(d) Either action under paragraph (b) of this section shall provide a time period for the respondent to respond, and shall also provide a time period for the respondent to come into compliance. If voluntary compliance efforts are unsuccessful, enforcement action may be taken. If voluntary compliance efforts are successful, NIGC staff will send an investigation completion letter pursuant to § 571.4.

(e) The Chair's discretion to take an enforcement action is not limited or constrained in any way by this section. When the Chair takes enforcement action before a letter of concern and/or warning letter is issued, the enforcement action will state the reasons moving directly to an enforcement action without first issuing a letter of concern and/or warning letter.

5. In § 573.3, revise paragraph (a) to read as follows:

**§ 573.3 When may the Chair issue a notice of violation?**

(a) The Chair may issue a notice of violation to any person for violations of any provision of the Act or this chapter, or of any tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

\* \* \* \* \*

**§ 573.6 [Redesignated as § 573.4]**

6. Redesignate § 573.6 as § 573.4

7. In newly redesignated § 573.4, revise the section heading and paragraphs (a) introductory text, (a)(3), (6), (7), (8), (9), (12), (c) introductory text, (c)(1), (c)(2) introductory text, and (c)(3) to read as follows:

**§ 573.4 When may the Chair issue an order of temporary closure?**

(a) When an order of temporary closure may issue. Simultaneously with or subsequently to the issuance of a notice of violation under §573.3 of this part, the Chair may issue an order of temporary closure of all or part of an Indian gaming operation if one or more of the following substantial violations are present:

\* \* \* \* \*

(3) A gaming operation operates for business without a tribal ordinance or resolution that the Chair has approved under part 522 of this chapter.

\* \* \* \* \*

(6) There is clear and convincing evidence that a gaming operation defrauds a tribe.

(7) A management contractor operates for business without a contract that the Chair has approved under part 533 of this chapter.

(8) Any person knowingly submits false or misleading information to the Commission or a tribe in response to any provision of the Act, this chapter, or a tribal ordinance or resolution that the Chair has approved under part 522 of this chapter.

(9) A gaming operation refuses to allow an authorized representative of the Commission or an authorized tribal official to enter or inspect a gaming operation, in violation of

§571.5 or §571.6 of this chapter, or of a tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

\* \* \* \* \*

(12) A gaming operation's facility is constructed, maintained, or operated in a manner that threatens the environment or the public health and safety, in violation of a tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

\* \* \* \* \*

(c) Informal expedited review. Within seven (7) days after service of an order of temporary closure, the respondent may request, orally or in writing, informal expedited review by the Chair.

(1) The Chair shall complete the expedited review provided for by this paragraph within two (2) days after his or her receipt of a timely request.

(2) The Chair shall, within two (2) days after the expedited review provided for by this paragraph:

\* \* \*

(3) Whether or not a respondent seeks informal expedited review under this paragraph, within thirty (30) days after the Chair serves an order of temporary closure the respondent may appeal the order to the Commission under part 577 of this chapter. Otherwise, the order shall remain in effect unless rescinded by the Chair for good cause.

8. Add § 573.5 to read as follows:

**§ 573.5 When does an enforcement action become final agency action?**

An enforcement action shall become final agency action and a final order of the Commission when:

(a) A respondent fails to appeal the enforcement action as provided for in part 577 of this chapter and does not enter into a settlement agreement resolving the matter in its entirety;

or

(b) A respondent enters into a settlement agreement resolving the matter in its entirety at any time after the issuance of the enforcement action.

DATED: December 16\_\_\_\_, 2011, Washington, DC.

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Tracie L. Stevens,

Chairwoman

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Steffani A. Cochran,

Vice-Chairwoman

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Daniel J. Little,

Associate Commissioner

7565-02

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